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W. Bradley Wendel

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Three Concepts of Roles

W. BRADLEY WENDEL*

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I. INTRODUCTION

One of Fred Zacharias's many and varied interests in legal ethics was the relationship between ordinary morality and the obligations imposed on lawyers by the rules of their professional role. This is an explicit subject of several articles¹ and a prominent theme in many others.² In all

* Professor of Law, Cornell University. The title is a pun on Rawls's famous paper on the practice conception of rules. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955). The point of the pun is to suggest a connection between practices and social conventions, on the one hand, and the authority of roles on the other. The question of how roles should be moralized is an important but somewhat under appreciated aspect of Fred's scholarship on legal ethics.

1. See, e.g., Fred C. Zacharias, *Five Lessons for Practicing Law in the Interests of Justice*, 70 FORDHAM L. REV. 1939 (2002) [hereinafter Zacharias, *Interests of Justice*]; Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541 (2009) [hereinafter Zacharias, *Integrity*]; Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997) [hereinafter Zacharias, *Reconceptualizing*]; Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671 (2010) [hereinafter Zacharias, *Steroids*]; Fred C. Zacharias, *The Images of*

of these articles, Fred is concerned with the moral agency and integrity of the lawyer.³ He resists the picture of legal ethics as an “amoral” domain⁴ and denies that a lawyer is obligated “to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive.”⁵ In Fred’s vision of ethical lawyering, the role of lawyer is itself a worthwhile moral commitment, and to the extent it requires lawyers do to something that would be contrary to the demands of ordinary morality, the role provides safe harbors or escape valves for lawyers who insist on following their consciences. He writes, for example, that “because ethics codes demand moral introspection from lawyers, they must leave lawyers a degree of discretion.”⁶ Roles cannot be all-encompassing, and professional regulators should forget about their preoccupation to regulate comprehensively all aspects of the activities of lawyers.⁷ Moreover, roles do not create moral permissions to cause

Lawyers, 20 GEO. J. LEGAL ETHICS 73 (2007) [hereinafter Zacharias, *Images*]; Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191 (2001).

2. See, e.g., Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006); Fred C. Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491 (2008); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002).

3. I found myself referring to Professor Zacharias as “Fred” as I was writing this Article and realized that in the back of my mind, I was assuming that he had read it, and we would talk about it at a conference, and hopefully we would both learn something we could put to use in our future scholarship. It is a measure of Fred’s impact on the scholarly community that it is hard to imagine writing about these issues without having him as a reader and commentator. The familiar mode of address in this Article is intended as a small sign of our collective loss.

4. See generally Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (discussing the “heated academic discourse” regarding the amorality of the lawyer’s role). Like all sophisticated defenders of the standard conception of legal ethics, Pepper offers moral reasons why lawyers ought to be bound by the duties of their role, despite what seem to be the contrary demands of ordinary morality. See *id.* at 628–35. In Pepper’s case the argument depends on the value of autonomy. See *id.* at 617–19. Thus, the word *amoral* may have been an infelicitous one, but in any event, critics of the standard conception sometimes overlook the moral arguments that have been given by its defenders. For recent arguments in favor of the standard conception, see TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE* (2009); and W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010).

5. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3 (1975).

6. Zacharias, *Reconceptualizing*, *supra* note 1, at 185; see also Zacharias, *Steroids*, *supra* note 1, at 697 (“[T]he codes are designed in part to produce morally diligent lawyers, not automatons who follow only specific prohibitions.”).

7. See Zacharias, *Images*, *supra* note 1, at 87–88.

harm.⁸ The principle of nonaccountability, which is one of the three aspects of the standard conception of the lawyer's role, is either false or too strong.⁹

In his recent article, *Integrity Ethics*, Fred explored the internal normative structure of the lawyer's role, distinguishing between rules of role and integrity rules.¹⁰ Rules of role are those norms that constitute a social role and regulate the activities of people acting in the capacity of a role occupant. Integrity rules permit the occupant of a role to refer to ordinary moral considerations in deliberation and to justify an action on the grounds of reasons and values that are external to the role.¹¹ This structure is "designed to [en]sure that lawyers do not take the demands of role too far,"¹² that is, to ensure that lawyers remain moral agents first and only secondarily subject to the obligations of role.¹³ Descriptively, the regime of professional regulation governing the American legal profession is set up to "ensur[e] that lawyers behave as ordinary human beings would behave if put into the same position as, and understanding the demands upon, lawyers."¹⁴ Normatively, this is a good thing. A role ought to be designed to accomplish morally valuable ends, such as "furthering the adversarial system or . . . maintaining legal institutions."¹⁵ If a lawyer's actions do not tend to further those ends, however, the lawyer should be guided by the ethics of ordinary persons.

The question Fred is concerned with in his work on role morality is a very general and important one.¹⁶ It is the question of the moral status of

8. See Zacharias, *Interests of Justice*, *supra* note 1, at 1941.

9. For the principle of nonaccountability, see generally DARE, *supra* note 4, at 10–11.

10. See Zacharias, *Integrity*, *supra* note 1, at 553–54.

11. *Id.* at 571 ("Integrity rules . . . are intended to remind lawyers that they are governed by, and may implement, generally applicable morality.").

12. *Id.* at 545.

13. See *id.* at 545.

14. *Id.* at 547.

15. *Id.* at 554.

16. In its general form, the question raised here is how to deal with second-order reasons. First-order reasons are considerations counting in favor of taking some action or another, while second-order reasons are grounds for not acting on reasons. See JOSEPH RAZ, *Law and Authority*, in *THE AUTHORITY OF LAW* 3, 16–18 (1979). Some philosophers—most prominently Raz—believe conflicts between second-order and first-order reasons are resolved by trumping or exclusion. Criticizing this model, Michael Moore argues that what appear to be second-order reasons should be regarded as a species of newly created first-order reasons, albeit with very substantial weight, but that they should not exclude consideration of first-order reasons. See Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 849–59 (1989).

role obligations or how roles should be moralized. The aim of this Article is to explore three alternative ways of conceiving of the relationship between morality and role obligations. The first, which is the target of Fred's critical scrutiny, is strong role differentiation, often thought to be part and parcel of the standard conception.¹⁷ The standard conception of the lawyer's role consists of the principles of partisanship, neutrality, and nonaccountability. For present purposes, the important implication of the standard conception is the exclusion of ordinary moral reasons from the deliberation of lawyers acting in a professional capacity. Lawyers adhering to the standard conception are directed to seek to protect or advance the legal rights of their clients—partisanship; not to consider their own views of the moral merits of their clients' positions—neutrality; and to rest assured that they will not be subject to justified moral criticism by observers—nonaccountability.¹⁸ This conception of role is said to be differentiated to the extent it posits exclusionary obligations or permissions—role-specific prescriptions that preempt, supersede, or outweigh what would otherwise be requirements of ordinary morality. This is a conception of roles as generating exclusionary reasons,¹⁹ which is central to the way I tend to think about professional obligations.²⁰ Arguably, if roles create exclusionary reasons, once one is functioning as an occupant of a role, there is no way to refer back to ordinary moral considerations, except by exiting the role altogether.

The second way of understanding the relationship between morality and roles is what I call the nexus view. A role, in this way of looking at

17. See DARE, *supra* note 4, at 29; see also ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 2–3 (1980) (distinguishing strong role differentiation from the requirement that a role occupant “figure in his moral calculations all consequences deriving from the institutional relations with others created by the position”).

18. DARE, *supra* note 4, at 74–75.

19. The Rawlsian approach to practices involves preemption of reasons that would otherwise be taken into account in all-things-considered deliberation. See Rawls, *supra* note *, at 14–17 (1955). For example, if we give a utilitarian justification for the practice of promising—that there is great value in having a means to create and enforce expectations of future conduct by other people—the justification may be undercut in any given case in which the balance of utilities favors breaking the promise. There is no way to account for the stringency of the obligation to keep promises solely on utilitarian grounds because there very well might be cases in which the best thing, as a whole, would be for the promisor to break the promise. The explanation for keeping promises is instead that many practices, including promising, are constituted by rules, which are not simply guides, summaries, or rules of thumb that simplify the all-things-considered moral evaluation of what should be done, but are conclusive demands that are binding as long as one is acting within that practice. *Id.* at 24–25.

20. See WENDEL, *supra* note 4, at 86–89 (arguing for an exclusionary-reasons approach to the lawyer's ethical role).

things, is merely a shorthand way of describing a cluster of obligations, permissions, and aspirations that apply by virtue of standing in a particular kind of relationship with others.²¹ If I leave work early one day to see one of my children in a concert at school, I could explain to my dean that I had an obligation, as a parent, to go see the performance. There is nothing ontologically mysterious about this explanation. The invocation of the parental role is just a way of summarizing reasons relating to what I owe to my children—my time, presence, interest in their activities, involvement in their education, knowing their teachers and friends, and so on. If the role obligation seems to supersede another duty, arising from ordinary morality or from another role—in this case, my role as a teacher—it is only because the reasons bound up in the role explanation should take precedence, in these circumstances, over other considerations. Speaking of “occupants” and “roles” is thus somewhat misleading because a person does not enter a different evaluative domain even when that person’s actions might naturally be described in role terms. Rather, there is only one normative domain, that of ordinary morality. On this account there are what one might call natural roles, such as parent or physician, which refer to a concatenation of obligations arising from truths about what kinds of creatures we are, such as the dependence of children upon their parents or the fact that people get sick and are in need of medical care.²²

The third way of conceptualizing roles is what I believe Fred is arguing for in his *Integrity Ethics* article and elsewhere. This is the idea of a recourse role. Gerald Postema’s well-known article introduced this idea into the legal ethics literature,²³ but it has its origin in a classic book by Mortimer and Sanford Kadish, *Discretion to Disobey*.²⁴ The Kadish brothers argue that sometimes the best way to remain faithful to the

21. See, e.g., ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 45 (1999) (“[A]re roles merely shorthand for a nexus of obligations, values, and goods that have moral weight without appeal to role as a moral category?”); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 125 (1988) (“[T]he appeal to a role in moral justification is simply a shorthand method of appealing to the moral reasons incorporated in that role.”). Tim Dare calls this the “direct route” for moralizing roles. See DARE, *supra* note 4, at 33–40 (critiquing this approach).

22. APPLBAUM, *supra* note 21, at 48–49.

23. See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 82–83 (1980).

24. See MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973).

requirements of a role is to violate them. A role is constituted for some end. In many cases—maybe even most, depending on the role—the best way for a role occupant to accomplish those ends is to follow the directives of the role. In the case of lawyers, that would mean complying with state rules of professional conduct and other aspects of the law governing lawyers, as well as respecting informal ideals of the role such as zealousness in representation. There may be instances, however, in which the best way to achieve the ends of a role is to do something that is not permitted by the constitutive rules of the role. In order to make this determination, the occupant of a role must have recourse to the ends of the role—hence the name “recourse role.”²⁵ The important thing about the Kadishes’ analysis is that recourse roles build in the permission to go back to an all-things-considered evaluative standpoint. One is not exiting the role, but acting within it, when having recourse to the ends of the role. Judges who nullify the law are not acting lawlessly because the role itself permits this kind of incorporation of ordinary morality.

Each of these approaches has characteristic strengths and weaknesses. Strong role differentiation offers lawyers a simplified moral universe at the cost of cutting lawyers off from the resources of ordinary morality, which results in a sense of alienation and perhaps even of wrongdoing.²⁶ Roles appear to encourage, or at least permit, evasion of moral responsibility. Role occupants can externalize moral blame onto the role, prompting the observation that it cannot possibly be the case that “‘it be right that a man should, with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire.’”²⁷ There seems to be some kind of normative sleight of hand going on if a role purports to justify that which would otherwise be morally wrongful. If something is right, on the other hand, then the rightness should be captured by a direct pass-through of the moral evaluation. The nexus view thus eliminates conflicts between professional roles and ordinary morality, but its critics argue that it does so at the cost of undervaluing the ends served by the roles. Opening deliberation to case-by-case rebalancing of the underlying moral reasons tends to result in the policies underlying a role having very little weight.²⁸ Although it is appealing to insist that

25. *Id.* at 21–22.

26. For powerful critiques, see Postema, *supra* note 23, at 75–76, 79; and Wasserstrom, *supra* note 5.

27. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 9 (2007) (quoting Thomas Babington Macaulay, *Francis Bacon*, in 2 *CRITICAL AND HISTORICAL ESSAYS* 317 (1926)).

28. See David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 *MD. L. REV.* 392 (1990).

someone acting in a role remains fully accountable as a moral agent, the difficulty is that the morally valuable ends of a role can be eroded by giving evaluative priority to particular cases, as opposed to the long-run stability and proper functioning of institutions. In any given case, the marginal harm to the ends served by a role appears to be relatively insignificant, as compared with the personal involvement in wrongdoing that the role appears to demand. As a result, roles end up justifying very few departures from ordinary morality.²⁹

The idea of recourse roles is intended to steer a middle course. Roles do create genuine obligations for their occupants, which in many cases require departures from the requirements of ordinary morality. If the role appears to demand an action that is contrary to the ends of the role, however, the actor is justified in departing from the specific requirements of the role in order to further the substantive, underlying policies embodied in the role. I have argued for a fairly strong version of the standard conception, taking the nexus view as my primary point of departure. Upon reflection, it seems that the more significant challenge to my position comes from the conception of professional obligations as a recourse role.³⁰ Recourse roles do not permit case-by-case rebalancing of the underlying moral reasons. Rather, they contemplate a role that builds in the discretion to act directly on the ends of the role: “Though such a role may still require a role agent to act in a certain way, it may also permit him to conclude that complying with the role’s prescribed means would obstruct the role activity or defeat the role’s task or institutional ends.”³¹ This is not wide-open moral deliberation; rather, an agent has recourse only to certain considerations, such as the specific task the role is designed to accomplish.³² Although this is a somewhat limited scope of deliberation, it is nevertheless a powerful argument against the standard conception and the idea of strong role differentiation. A proponent of the idea of recourse roles would claim it is perverse to follow the requirements of a role—what the Kadishes call the roles-prescribed means—when to do so would result in defeating the

29. See DARE, *supra* note 4, at 39.

30. I am grateful to the participants in the jurisprudence panel at the Fourth International Legal Ethics Conference (ILEC4) at Stanford Law School, in July 2010. William Simon in particular raised objections that I was not able to answer adequately at the time, and David Luban reminded me of the Kadishes’ idea of recourse roles.

31. KADISH & KADISH, *supra* note 24, at 29.

32. See *id.* at 22.

role's institutional ends. Why should a lawyer follow the self-defeating strategy of adhering to some course of action that runs directly contrary to the values served by the professional role?

At the risk of oversimplifying a subtle argument, I take this to be the basic structure of Simon's critique of the standard conception.³³ His argument goes like this: The legal system and the associated role of lawyer are constituted for some purpose. The moral foundation of the legal system is the value of justice.³⁴ Bizarrely, however, lawyers think their role permits or requires them to promote the interests of their clients even if doing so would lead to injustice.³⁵ This is incoherent, and lawyers lack any good reason to respect the conventional norms of legal practice.³⁶ Ethical lawyering instead must be understood as that which aims at justice. It may do so indirectly if the lawyer has reason to believe that the institutions and procedures of the adversary system are functioning adequately.³⁷ When procedures cannot be relied upon to reach a just resolution, however, the lawyer must take personal responsibility for the justice of the outcome.³⁸ The conditions under which one may opt out of the demands of a role are therefore tied to the reasons for which the role was constituted in the first place. It would be incoherent to adhere to the demands of the role when these ends are not being served because the only reason the role creates legitimate demands in the first place—in the sense of having some claim to be morally worthy—is that the role is constituted and regulated to accomplish some morally worthy end.

No sensible person believes that the role creates absolute demands that can never be overridden. Even supporters of strong role differentiation believe that eventually the obligations of one's role must give way to other obligations. The reason is that, in order to be legitimate, the demands created by roles must have some moral foundation, and it is unlikely that there can be any absolute demand of morality that does not admit of exceptions in extraordinary circumstances. The question for role theorists, including Fred in his work on the relationship between roles and morality, is when the demands of roles can be overridden. In the discussion that follows, I will analyze the way in which roles create obligations for their occupants and consider the question of when the demands of role must give way to other obligations, grounded in

33. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

34. *Id.* at 2.

35. *See id.* at 27–31.

36. *See id.* at 156–62.

37. *See id.* at 139–40.

38. *See id.* at 141–44, 164–69.

ordinary morality. The conclusion will be that the notion of recourse roles is compatible with the standard conception, as long as the conditions under which an actor may invoke the underlying ends of the role are strict enough.

II. HOW DO ROLES OBLIGATE?

A role is “what one ordinarily has in mind when one speaks of acting in a certain capacity, or of being constrained by one’s position, or of standing in a certain relationship to someone.”³⁹ Roles and associated norms can be the product of deliberate institutional design, or they can result from a gradual evolution of social expectations regarding appropriate action under some role description—“parent,” “teacher,” or “doctor.”⁴⁰ The role of lawyer results from both intentional actions and a network of expectations. Official lawmaking institutions, such as state courts, promulgate enforceable rules of professional conduct, and lawyers are subject to the constraints of generally applicable law. At the same time, many of the most important norms governing the profession result from tradition, custom, and social expectations. The idea of zealous advocacy, for example, has never been an enforceable legal rule, but it is one of the strongest normative commitments characterizing the American legal profession. Similarly, although the United States does not have a “cab-rank” rule, requiring lawyers to accept all representations they are competent to carry out, there is an informal norm of representing unpopular clients.⁴¹ In both the zealous advocacy and client selection cases, a lawyer would be subject to criticism for violating these expectations. Moreover, a lawyer viewing her role from the internal point of view—as creating justified obligations—would believe herself to be required to be a zealous advocate and to represent unpopular clients, even though there is no formal legal rule establishing these duties.

Formal and informal norms—those that result from authoritative lawmaking and those that arise more organically, out of conventional social behavior—both constitute a professional role and regulate the activities of people acting in a professional capacity. The distinction

39. KADISH & KADISH, *supra* note 24, at 15.

40. See DARE, *supra* note 4, at 30.

41. For the ideal of zealous advocacy and the cab-rank principle in U.S. law, see WENDEL, *supra* note 4.

alluded to here is from John Searle, who points out the importance of rules or conventions that constitute an activity as opposed to merely regulating a preexisting activity.⁴² Searle's example is the collective intentionality surrounding money. One cannot give a causal account to explain the function of currency without referring to conventions that assign a particular status to a little green piece of paper, described in a certain way. Constitutive rules enable us to go beyond the "sheer brute physical functions" of objects.⁴³ Something counting as money is not a physical, causal relationship. Rather, it depends on collective agreement and the social acceptance of little green pieces of paper, featuring pictures of dead presidents, as a medium of exchange. Conventions change the meaning of objects and actions. Moreover, the convention of treating pieces of paper as a medium of exchange acquires normative status.⁴⁴ It is possible to make "ought" statements regarding the pieces of paper—one ought to accept a five-dollar bill in exchange for coffee and a bagel, or one ought not to attempt to counterfeit paper currency. Normativity thus arises from a conventional practice of treating some act or object in a given way, in some context.⁴⁵

Searle's account of constitutive rules has a great deal in common with H.L.A. Hart's explanation of the normativity of law. A legal system purports to create reasons for action that are acknowledged by citizens using the language of obligation, such as "ought," "duty," "right," and "wrong."⁴⁶ The normativity of law cannot be explained simply in terms of behavioral regularities—people tend to stop at red lights, pay their taxes, et cetera.⁴⁷ Hart further distinguishes between acting out of *obligation* from acting because one feels *obliged*.⁴⁸ Acquiescing in the demand of a robber reflects a sense of being obliged to act, which is a prudential reason, while paying taxes out of a sense that it is the right

42. See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 43–51 (1995).

43. See *id.* at 44.

44. *Id.* at 48.

45. As Rawls argues, the content of standards regulating a practice is linked with the purpose underlying the practice. See Rawls, *supra* note *, cf. Zacharias, *Reconceptualizing*, *supra* note 1, at 176–77 (noting that lawyers' obligations may vary depending on social expectations).

46. H.L.A. HART, *THE CONCEPT OF LAW* 57 (2d ed. 1994).

47. See Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 311 (Jules Coleman ed., 2001); see also HART, *supra* note 46, at 89 ("If . . . the observer really keeps austere to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty.").

48. See HART, *supra* note 46, at 82–83, 88–89; Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167, 174–75 (1999) (explaining this distinction).

thing to do reflects obligation, a normative notion. The foundation of Hart's jurisprudence is the argument that, in order for there to be a legal system instead of either happenstance behavioral regularities or mere coercion, it is necessary that judges accept a rule of recognition from the internal point of view.⁴⁹ Here are two essential Hartian concepts: The internal point of view is the perspective of one who accepts a practice as creating justified demands, namely, obligations.⁵⁰ The rule of recognition specifies criteria for identifying the sources of law, which can include judicial decisions, statutes and administrative regulations, and even conventions such as interpretive methodologies and canons of statutory construction.⁵¹ Like Searle's explanation of how handing over a piece of green paper can create an obligation to deliver some good or service, Hart's explanation shows how there can be a genuine obligation to act on the grounds of reasons given by authoritative legal sources.

Strictly speaking, Hart's account extends only to the obligations of judges and only with respect to secondary rules. He says that citizens are not required to take the internal point of view with regard to the law,⁵² and he has nothing whatsoever to say about the obligations of lawyers. I have argued, however, that citizens can commit themselves to taking the internal point of view if they seek to avail themselves of a

49. See HART, *supra* note 46, at 116 ("[If the rule of recognition] is to exist at all, [it] must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only.").

50. *Id.* at 89; see also ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 190 (2d ed. 1984) ("To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them."). The invocation of MacIntyre here, and his notion of practices, is intentional and reflects my view that the normativity of roles arises in the same way as normativity arises in practices generally.

51. See HART, *supra* note 46, at 100–01.

52. See *id.* at 116 ("[P]rivate citizens . . . may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them."); see also Kenneth Einar Himma, *Law's Claim of Legitimate Authority*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW*, *supra* note 47, at 271, 286 ("While legal normativity requires that officials take the internal point of view towards the rule of recognition, it does not require that citizens do so."); Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 158, 169 (Steven J. Burton ed., 2000) (noting that Hart "maintains that the only persons who *must* be regarded as having adopted the [internal] point of view are judges," and calling this a "minor embarrassment" to his position).

legal justification for their actions.⁵³ Appeals to the legitimating discourse of legality necessarily imply that one is committed to acknowledging that the law creates genuine rights and duties. One can speak as an external observer, and note that a practice creates obligations for those who are “inside” the practice, but deny that one is obligated oneself.⁵⁴ But once one expresses acceptance of a norm, one is taking the internal point of view, not a detached, external perspective. Appealing to the law as a justification for an action implies that both the speaker and the person to whom the justification is addressed accept that the legality of an action makes a difference, normatively speaking. Invoking legality engages with the reasons why the procedures of lawmaking and law application in a democracy are legitimate. Doing something pursuant to a legal justification expresses respect for the underlying fact that citizens may disagree about what rights they ought to have but recognize that some resolution of this disagreement is necessary so that a stable framework for coexistence can arise. Law is an alternative to the exercise of naked power, which fails to manifest respect for the equality of all citizens who are affected by an action.

One of the most important functions of the discourse of ethics is justifying one’s actions when they affect the interests of another.⁵⁵ Legality creates the possibility of giving an ethical justification that invokes the values of dignity and respect in the context of people living together in a political community. Imagine that a local government unit takes part of a person’s land, paying fair market value for it, and uses it to build a highway. If the owner protests, the government could either respond (1) “you are powerless to resist us, so be thankful we paid anything at all for your land,” or (2) “we took your land pursuant to a legal process that ensures you would be treated fairly and the land taken only for public purposes.” The first statement expresses raw power and the ability of the stronger to dominate the weaker. The second expresses respect for the landowner as a fellow citizen, whose voice counts in the process of establishing a framework of norms within which citizens can

53. See W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 *FORDHAM L. REV.* 1473 (2006). The argument in that paper was influenced by Kevin Toh, *Hart’s Expressivism and His Benthamite Project*, 11 *LEGAL THEORY* 75, 83 (2005).

54. See JOSEPH RAZ, *The Nature of Law and Natural Law*, in *THE AUTHORITY OF LAW*, *supra* note 16, at 37, 153–57 [hereinafter RAZ, *Nature of Law*]; JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 175–77 (1975). Standard examples of statements from a detached normative point of view include a non-Catholic’s advice to a friend, “You ought to go to Mass today,” or a meat-eater saying to a vegetarian, “You shouldn’t eat that dish—it contains meat.”

55. See generally T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998) (setting out a contractualist metaethics, in which the basic strategy of justification is to seek a set of principles for the regulation of behavior that no one could reasonably reject).

coexist. Presumably, the local government unit possesses eminent domain power that is created and regulated by statute, and all affected citizens have an equal opportunity to lobby their state's legislature for changes to the law. This opportunity may not count for much. There is a reason we all know the saying, "You cannot fight City Hall." Still, it is not insignificant that the state is constrained by the requirement that it act only pursuant to a legal justification and that the lawmaking process is open to input from the individuals subject to state power.⁵⁶ The discourse of legality also ensures compliance with rule-of-law values, such as generality, impartiality, and fair notice.⁵⁷

The idea here is that one can get "inside" practices, roles, or discursive communities. Once inside the practice, the norms governing the practice are obligatory for the participant. The further question, however, is whether one has a reason to opt in to a practice or role. The answer to this question will tell us a great deal about how the role should be structured. In particular, it will address the idea of having recourse to external considerations, such as ordinary morality. With respect to law and the role of lawyer, what reason would anyone have to take into consideration whether something is lawful when deliberating about what to do? If legality should make some difference, then there is an answer to the question of why anyone ought to appeal to the discourse of law as a justifying strategy. Notice that the nexus view of roles is committed to denying that the law changes deliberation in any distinctive way. If something is unlawful, that fact may affect the balance of reasons if the actor is interested in avoiding legal penalties or social sanctions for being a lawbreaker. But these are reasons the actor had anyway,

56. The example in the text involves a Hohfeldian power on the part of the state, which is correlated with a liability on the part of the landowner. The normative idea is that the power is justified because it is lawfully exercised. A similar analysis can be given of different legal relationships. Suppose I park on the street and do not get a ticket. My explanation of this fact can be either (1) I got away with it because there were not enough police officers writing tickets in that area at that time, or (2) I had a right to park there because I put coins in the meter, or it was after 6:00 p.m. The second explanation invokes a Hohfeldian privilege on my part, which is correlated with a "no right" on the part of the state—a lack of rightful authority to penalize me for parking. The first explanation does not invoke any *juridical* relationship at all, appealing instead to happenstance. See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., 1923).

57. Cf. Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.*, *supra* note 52, at 206 (arguing that, for Hart, what distinguishes law from other forms of social guidance is that the law provides guidance through rules).

independent of the legal status of the action. On the nexus view, there is no way to account for the idea of the law creating obligations.⁵⁸ The sanction-avoiding, Holmesian bad-man attitude does not differentiate between the law and any other exercise of power, nor can it differentiate between being obligated to do something and feeling obliged to do so, out of desire to avoid the negative consequences of violating the law.

To see what difference law makes, consider one of the classic legal ethics cases.⁵⁹ Borrower runs a small business. He borrows \$5000 from Lender, his neighbor, and executes a simple promissory note agreeing to repay Lender beginning on a certain date. The date passes, and Lender never asks for the money back. Seven years pass, and the economic situation of the parties reverses dramatically. Borrower's small business has flourished and was acquired by a much larger company; he is now a highly compensated executive with that company. Lender has fallen on hard times; he lost his job, had his house foreclosed upon by the bank, and is now in desperate need of money to meet medical expenses. A friend of Lender who is a lawyer agrees to represent him for free, in an attempt to recover the \$5000 plus interest that Borrower owes him. Borrower, who could write a check for \$5000 and hardly notice the difference in his bank account balance, directs his lawyer to oppose Lender's claim, using "any lawful means." The applicable statute of limitations provides that an action to recover on a debt must be filed within six years of the debtor's default. Borrower's lawyer accordingly files a motion to dismiss the lawsuit as time-barred, which the trial judge granted.

On the nexus view, the analysis would be given in straightforward moral terms. In ordinary life, breaking promises is wrong. Promises create obligations, and people act wrongly when they break their promises without a good reason. Adding the further fact that the promisor had subsequently become wealthy and could easily afford to repay a debt to the promisee, who badly needed the money, may

58. One of the targets of Hart's jurisprudential theory is the so-called Holmesian bad-man theory of law, after the definition of law given by Oliver Wendell Holmes, Jr. Holmes defined the law from the standpoint of a person who was interested only in avoiding legal sanctions and thus was interested in predicting how legal officials might decide particular cases. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–62 (1897). Hart's idea of the internal point of view is intended to capture the perspective of a citizen who wishes to follow the law for nonprudential reasons. See BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 51 (4th ed. 2006).

59. The discussion of this case is adapted from WENDEL, *supra* note 4. The problem is based on the classic case of *Zabella v. Pakel*, 242 F.2d 452 (7th Cir. 1957), although I have embellished the facts in some places and simplified them in others. *Zabella* serves as an example in many leading works of legal ethics theory. See, e.g., DARE, *supra* note 4, at 2–3; SIMON, *supra* note 33, at 29; Postema, *supra* note 23, at 66.

augment the sense of wrongdoing. Perhaps the disparity in wealth between the parties creates an additional obligation of fairness, or the promisor's failure to perform his promise has worse consequences than the failure to repay a debt to a creditor who has plenty of money. Applying these ordinary moral reasons to the analysis of Borrower's lawyer's decision to plead the statute of limitations, it seems difficult to avoid the conclusion that Borrower is cheating somehow—evading his legitimate obligation to Lender—and that Borrower's lawyer is helping him cheat.⁶⁰

The nexus view is incapable of capturing the distinctiveness of the institutional context, and the difference that legality makes. Failing to repay a legitimate debt may be described in moral terms as cheating or chiseling, but pleading the statute of limitations seems to call for a different description, in distinct evaluative terms, because the defense to the claim for repayment is part of a system that has been established to adjudicate the legitimacy of the obligation.⁶¹ Calling Borrower's obligation "just," and thus criticizing his lawyer in moral terms, may be putting the cart before the horse by assuming the debt is justly owed when that is exactly what the legal system needs to determine. The *legal* justice of the obligation in this case is a function not only of Borrower's having agreed to repay Lender but of Lender's having followed certain formal procedures to establish a legally enforceable claim to repayment.

But why should we care about legal justice, as opposed to substantive—moral—justice? A proponent of the nexus view might respond that she and I are talking past each other. My claim is that *if* we value the evaluative notion of legality, then we do not describe Borrower as a cheater, but there is still a big "if" in that argument. Although a complete answer to the question would require much more detail,⁶² the short answer is that we should care about legal justice because when we make decisions collectively, as a society, about what rights and duties we ought to have with respect to one another; we necessarily reason from a third-person-plural standpoint, one in which the beliefs about

60. That, at least, is how Daniel Markovits analyzes the case, as part of his argument that the lawyer's professional role comprehensively obligated lawyers to lie and cheat. See DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 64–65 (2008).

61. See APPLBAUM, *supra* note 21, at 91–96 (arguing that descriptions in ordinary moral terms persist, despite the existence of other practice-based descriptions).

62. This is why I wrote WENDEL, *supra* note 4!

right and wrong of any given person are inputs into a decisionmaking process but not conclusive of the answer to the question of what should be done. People disagree about what morality requires, in general and in particular cases. As John Finnis puts it, we have to engage in practical reasoning about the relationship between our own well-being and the well-being of others.⁶³ Although we can agree on the importance of certain basic values at a high level of generality, we have to determine what these moral values mean in terms of concrete, practical action. Our reasoning about the demands of morality must be coordinated with that of others; without this coordination, we cannot be said to be acting in a community.⁶⁴ When we act in communities with others, and our actions affect the interests of others, we have to think about what morality demands of us as individuals but also be sensitive to the possibility that others might disagree with our specification of concrete principles for action and how competing principles should be weighted and prioritized. The role of the law, on this version of a social contract theory of obligation, is to coordinate the efforts of all citizens to comply with the demands of morality in a political community.⁶⁵ Individual reason alone will not lead to a conclusion regarding what morality requires in a community because compliance with morality in a community *means* coordinating one's own beliefs about morality with the beliefs of others.

This is, in part, a conceptual argument. When we reason about what rights and duties we have, which are socially sanctioned in some way, we are appealing to the idea of a political authority that coordinates the attempts of citizens to comply with the demands of morality. This authority need not necessarily be one that respects the ideal of the rule of law. Citizens could coordinate their compliance with the demands of morality by referring questions about what ought to be done to a recognized source of moral wisdom like a sage or a member of the clergy, and I suppose they could even consult soothsayers or oracles. People could also, of course, attempt to persuade each other. In a large, modern, decentralized, liberal, pluralist, secular society, however, citizens generally opt to establish institutions and procedures for the purpose of prescribing socially sanctioned rights and duties. These institutions and procedures are themselves subject to moral evaluation, in terms of distinctively political values, such as representativeness, responsiveness, transparency, and efficiency. Ideally, it would be possible for every citizen to have as much of a voice in the process as possible, consistent with the needs of other citizens also to have a voice.

63. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 134 (1980).

64. *Id.* at 147–50.

65. *See id.* at 246–48.

Even though this ideal is seldom realized, the underlying value is the same, namely that of equality.⁶⁶ No one's views should count more than those of others, and citizens should not act peremptorily by substituting their beliefs about what ought to be done for the socially sanctioned rights and duties created by political procedures and institutions.

The reason to opt in to the justifying discourse of legality, therefore, is that it manifests respect for the equal worth and dignity of one's fellow citizens. People who disagree can deal with each other in various ways. The least respectful way involves attempting to dominate others by physical force or intimidation. This response to disagreement fairly obviously displays the attitude that others are merely obstacles to realizing the satisfaction of one's desires, not to mention creating the cycle of violence and fear so memorably described by Hobbes.⁶⁷ A more respectful way of handling disagreement is to seek to persuade others. An attempt at persuasion appeals to another's status as someone who can be moved by appeals to shared interests and values, thereby displaying recognition of the equality of the participants in the dialogue, at least with respect to the capacity to deliberate on reasons.⁶⁸ If persuasion is ineffective, however, a society needs to be able to fall back on procedures that do as well as possible at treating the views of all citizens as presumptively entitled to respect, consistent with the need to eventually resolve the dispute and settle on a common course of action in the name of the community as a whole. The aim for which these political procedures are constituted is to manifest respect for the status of others as bearers of moral rights. If a group claims that the law does not really create an obligation, it is in effect claiming a kind of superior power over its fellows, an immunity from having to abide by the same rules as others. It is no different than pushing to the front of a queue or using connections to get a child into an elite private school. The reaction that people have to those who jump queues or exploit connections—"Hey, you jerk! What makes you special?"—manifests the sense of offense we experience at having been treated as less than an equal by the

66. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 114–17 (1999).

67. See THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press Rev. Student Ed. 1991) (1651).

68. See WALDRON, *supra* note 66, at 282 ("The identification of someone as a right-bearer expresses a measure of confidence in that person's moral capacities—in particular his capacity to think responsibly about the moral relation between his interests and the interests of others.").

offender. That is the normative underpinning of the practice of justifying one's actions with respect to the law.

To the extent we speak of the law creating obligations, and excluding reference to ordinary moral reasons, we are asserting that the law has *authority* over its subjects. Authority, legitimacy, and obligation are all related terms, so it is important to keep clear on the relationship between them.⁶⁹ Although there can be theoretical authorities—who alter the reasons one has to believe something—for our purposes we are concerned with practical authorities—who give reasons that serve as premises in practical inferences.⁷⁰ That an authority has said “do such and such,” or “do not do such and such,” is a reason for the subject of authority. In this way, the authority has normative power over its subject. Significantly, the directive of an authority is a second-order reason—a reason to act, or not to act, on other reasons.⁷¹ It excludes reference to one's judgment of the merits of the case for acting. To accept a directive as authoritative means to treat it not as another reason to be factored into the balance of first-order reasons that bear on decisionmaking but to regard it as preempting that kind of decisionmaking process altogether.⁷² Why on earth should anyone accept an authoritative directive as exclusionary? It would indeed be irrational to follow the commands of an authority unless the authority were legitimate.⁷³ A legitimate directive, however, is issued by an authority with the right to rule. This right correlates with duties on the part of the subject. These can be strong duties, such as the obligation of obedience, or something weaker, such as a duty of noninterference or to respect the law.

Joseph Raz has argued that the normal way of justifying authority—establishing that it is legitimate—is to establish that following authority is likely to enable the subject to do better at complying with the reasons that would have applied to the subject anyway.⁷⁴ There is a deep connection between legitimacy and democracy because Raz also argues that the primary function of political authorities is to serve the

69. For a helpful overview and clarification of these concepts, see generally Tom Christiano, *Authority*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jul. 2, 2004), <http://plato.stanford.edu/entries/authority/>. Legal theorists tend to run them all together in practice. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 191 (1986) (“A state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them.”).

70. See RAZ, *Nature of Law*, *supra* note 54, at 10.

71. *Id.* at 17.

72. *Id.* at 27.

73. See generally A. JOHN SIMMONS, *POLITICAL PHILOSOPHY* 40–45 (2008); JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 194, 212 (1994).

74. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53 (1986).

governed.⁷⁵ In a liberal democracy, legitimacy requires that government authorities issue directives that are rooted in considerations that may be endorsed by all affected citizens, as free and equal coparticipants in governance.⁷⁶ I have argued that, in a liberal society, these considerations are the fact of reasonable pluralism—disagreement that cannot be settled by reasoning alone—and the need to settle on a basis for mutually beneficial cooperation. In light of these considerations, as Finnis notes, “There must be either unanimity, or authority. There are no other possibilities.”⁷⁷ If reason alone is insufficient to secure unanimity—and I believe it is—then the only possibility for citizens who are bound to comply with the requirements of morality in a community is to follow the directives of an authority, which is generally the law.⁷⁸

The same pattern of argument explains the moral reasons that inform the lawyer’s role. Recall on the Rawlsian approach to practices, there are moral reasons for constituting the practice and then for precluding subsequent case-by-case evaluation of the morality of actions within the practice. The social function of the law is to settle normative disagreement procedurally and to adopt a provisional social settlement of moral conflict that excludes evaluation on the basis of the reasons that otherwise would have applied to the parties. Thus, the social function of *lawyers* is to facilitate the effective functioning of the legal system. In an adversarial system, they do so by representing clients—lawyers are not judges—but significantly they must represent clients within the bounds of the law. Lawyers acting in a representative capacity are agents for their clients, and as a matter of agency law, they can have no rights greater than those provided by their clients’ legal entitlements. Thus, morality enters the role in an indirect way—through the way the role is established and regulated. This is the point at which Fred’s critical argument enters the picture, for he wants there to be a more permeable role, with morality woven in throughout, rather than simply being relevant to the design of the role and thereafter excluded.

75. See *id.* at 56.

76. See John Rawls, *Reply to Habermas*, 92 J. PHIL. 132 (1995), reprinted in *POLITICAL LIBERALISM* 372, 393 (2005).

77. FINNIS, *supra* note 63, at 232. There is another possibility, namely chaos, but then there would not be a stable community.

78. For reasons well-summed up by Rawls’s burdens of judgment or Waldron’s circumstances of politics. See WALDRON, *supra* note 66, at 101–02; Rawls, *supra* note 76, at 54–58.

III. ROLE OBLIGATION AND ORDINARY MORAL OBLIGATION

Fred's work on the relationship between role obligations and morality makes two claims: one descriptive and one normative. The descriptive claim is that the American law governing lawyers in fact does create space for deliberation on ordinary moral considerations.⁷⁹ His normative claim is that it, and any system of rules governing the legal profession, ought to do so.⁸⁰ I will consider each of these points in turn, both of which have a core of truth but are stated too strongly. In fact, the law of lawyering is fairly restrictive with respect to ordinary morality. There are some places in which moral considerations may be incorporated into deliberation, but there are many other contexts in which the reasoning to be followed is given by the law alone. The law in this case consists of the substantive and procedural law creating client entitlements as well as the agency, contract, and tort principles establishing the parameters of the attorney-client relationship. Moreover, this is, as it ought to be, in order that the law retain authority and be capable of fulfilling its coordinating function.

A. *Positive Claim: The Law of Lawyering Preserves a Lawyer's Integrity*

Fred cites a number of provisions in the ABA's *Model Rules of Professional Conduct* that he claims incorporate, by reference, principles of ordinary morality.⁸¹ Most of the rules he mentions are nonmandatory. For example, Model Rule 2.1 permits, but does not require, a lawyer to discuss with the client "other considerations such as moral, economic, social and political factors."⁸² Most lawyers probably think they are permitted to discuss nonlegal factors with their clients, so if the rule has any function at all, it is either aspirational—suggesting that lawyers should have these discussions more often with their clients—or defensive—responding to an unarticulated concern about being held liable to clients for counseling them on nonlegal matters. Similarly, the rule on the allocation of decisionmaking authority between lawyers and

79. See Zacharias, *Integrity*, *supra* note 1, at 559–64.

80. *Id.* at 566–80 ("The danger in adopting these codes is that lawyers and clients may come to treat lawyers too distinctly, in theory or in practice 'A core function of the codes is to put lawyers on the *same* moral footing as everyone else'"). Fred talks about the codes as "a mechanism for tweaking generally applicable legal and ethical constraints to fit lawyers' peculiar lives," *id.* at 566, indicating his commitment to the nexus view of roles.

81. See *id.* at 560 (setting out table of rules "suggesting the pertinence of universal ethical behavior").

82. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2010).

clients, and a comment to that rule, simply restates a principle of agency law that lawyers have discretion to make decisions with respect to the means used to accomplish client objectives.⁸³ Fred reads this as a permission to “exercise common courtesy”⁸⁴ because this is the rule that is implicated when one discusses cases in which the client wants the lawyer to be a hyperaggressive advocate,⁸⁵ but again the rule does not impose obligations on lawyers.

On the other hand, there are many provisions in the *Model Rules* that create stark conflicts with ordinary morality. Daniel Markovits argues that the law of lawyering, considered as a whole, requires lawyers to lie and cheat.⁸⁶ The requirements of the lawyer’s role sharply diverge from morality, and any “technical limits”⁸⁷ placed by the positive law governing lawyers are just that—marginal constraints on what is, at root, a practice with an innate normativity, an “organic structure,”⁸⁸ that mandates vicious conduct. It is not necessary to characterize the lawyer’s role as a unified whole, however, in order to make the point that in some cases a lawyer will be obligated to do something that would otherwise be a moral wrong. The famous *Spaulding* case, for example, involves a conflict between, on the one hand, the moral obligation to take steps to save another’s life, at least if it is possible to do so relatively easily and without exposing oneself to risk, and on the other, the legal duty of confidentiality.⁸⁹ Although students often want to find

83. See *id.* R. 1.2(a) & cmt. 2.

84. See Zacharias, *Integrity*, *supra* note 1, at 560.

85. See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 87–88 (8th ed. 2009).

86. See MARKOVITS, *supra* note 60, at 35.

87. *Id.* at 42.

88. *Id.* at 45.

89. See *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). For an excellent historical reexamination of the case, see Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998). Briefly, for those readers who somehow have made it this far into the Article and do not know about *Spaulding*, the facts of the case are as follows, embellished somewhat to make the case more fun to teach: Spaulding and Zimmerman were involved in a car accident. *Spaulding*, 116 N.W.2d. at 706–07. As part of the postaccident negligence lawsuit, Zimmerman’s lawyer required Spaulding to submit to an independent medical examination at which a doctor hired by Zimmerman examined Spaulding to make sure he was not exaggerating his injuries. *Id.* at 707. This doctor diagnosed an aortic aneurysm—a dilation and weakening of a major blood vessel, which might rupture if not repaired surgically—of traumatic origin, which meant it resulted from the car accident. *Id.* Spaulding’s own physician, who treated him after the accident, had missed the aneurysm, and Spaulding’s lawyer was therefore preparing the case for trial

a way to wriggle out from the obligation of confidentiality, the rule in effect at the time did in fact prohibit the defense lawyer from disclosing the life-threatening injury, without the informed consent of the client, which I stipulate was refused.⁹⁰ There is no need to say that the role of lawyer always requires vicious conduct; interesting cases arise often enough that lawyers may expect to be faced with a conflict between the requirements of ordinary morality and their professional duties.

In those cases, the “integrity rules” pointed out by Fred do not offer much solace. True, the defense lawyer in *Spaulding* can counsel the client to disclose the plaintiff’s life-threatening injury,⁹¹ but in the end, if the defendant refuses to give informed consent to disclosure, it would be a serious violation of the duty of confidentiality for the defense lawyer to reveal the information.⁹² If the lawyer has a “fundamental disagreement” with the defendant’s refusal to disclose,⁹³ the lawyer is permitted to withdraw from the representation—if the trial judge agrees, that is⁹⁴—but withdrawal just passes the buck to the next lawyer and does not help the plaintiff. The lawyer is stuck with an ethical dilemma, forcing a choice between following the duty of confidentiality and responding to the ordinary moral requirement to disclose. Of course cases like *Spaulding* do not arise every day, but it is not difficult to think of examples like this one, in which there are no integrity rules permitting reference to ordinary morality.

or a negotiated settlement on the assumption that his damages were relatively modest. *Id.* at 707–09. Spaulding’s lawyer failed to request a copy of the medical examination report from Zimmerman’s lawyer, as he was entitled to do under the civil discovery rules, which were relatively new at the time in Minnesota and thus possibly unfamiliar to the lawyers. *See id.* Disclosing the aneurysm would eliminate the lurking risk of Spaulding’s death but would drive up the Zimmerman’s damages, perhaps over the limits of his liability insurance policy.

90. To make the problem difficult, when I teach this case, I ask students to assume that Zimmerman is a mean-spirited person who is completely indifferent to Spaulding’s welfare and refuses to consent to the lawyer disclosing the information. In reality, however, Zimmerman was nineteen years old at the time of the accident; Spaulding was twenty, and riding in Zimmerman’s car, so it is fair to infer that they were friends. Cramton & Knowles, *supra* note 89, at 88. I also hypothesize that Zimmerman could be financially ruined if he is hit for a judgment for the full amount of Spaulding’s damages, taking the aneurysm into account. In fact, the parties never contemplated damages in excess of the limits of the various insurance policies, for reasons relating to substantive tort law then in effect. *Id.* at 69–70.

91. *See* MODEL RULES OF PROF’L CONDUCT R. 2.1 (2010).

92. *See id.* R. 1.6(a) (2010) (duty of confidentiality and informed consent permitting disclosure).

93. *See id.* R. 1.16(b)(4) (2010).

94. *See id.* R. 1.16(c) (2010).

*B. Normative Claim: The Law of Lawyering Should
Preserve a Lawyer's Integrity*

Perhaps this observation raises precisely the problem—there are not enough integrity rules. A persistent theme in legal ethics scholarship is that ordinary morality ought to play more of a role in the deliberation of lawyers. David Luban and Deborah Rhode, for example, have argued that lawyers ought to accept personal moral responsibility for their actions when acting in a representative capacity.⁹⁵ As Kant noted, “ought” implies “can,” so if lawyers must accept moral responsibility for their actions, they must have the authority to act in the way morality requires. Thus, more integrity rules are needed. Similarly, William Simon argues that lawyers “should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”⁹⁶ Although this is a bit of a contested point, I think when Simon talks about justice he means to refer to substantive justice, quite apart from the legal merits of a party’s position.⁹⁷ His examples of lawyers participating in injustice are often cases, such as nondisclosure of confidential information, in which the legal merits of the client’s position would be substantively unjust.⁹⁸ Simon claims to “reject[] the common tendency to attribute the tensions of legal ethics to a conflict between the demands of legality on the one hand and those of nonlegal, personal or ordinary morality on the other.”⁹⁹ In the end, however, if there is a conflict, morality, in the guise of substantive justice, has the final say.

95. See LUBAN, *supra* note 21, at 160–74; DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 17, 58 (2000) (arguing that lawyers should take “personal moral responsibility for the consequences of their professional acts” and that lawyers should “act on the basis of their own principled convictions, even when they recognize that others could in good faith hold different views”); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1005 (1990) (“Morally activist lawyers hold themselves accountable for the means they employ and the ends they pursue on behalf of clients.”).

96. SIMON, *supra* note 33, at 138.

97. See *id.* at 82 (distinguishing a substantive conception of law, in contrast with positivism, which is committed to an interpretation of “specific legal norms as expressions of more general principles that are indissolubly legal and moral”).

98. See, e.g., *id.* at 62 (noting the divergence between the “technical” rules respecting confidentiality and the intuitions of lawyers and clients regarding what justice requires).

99. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1113–14 (1988).

The question therefore becomes, *should* there be more integrity rules? Or, in the terms of this analysis, should the lawyer's role be structured as a recourse role? Let us assume that there is a case in which the lawyer believes that doing what the law requires—either the lawyer doing it or the client doing it—would be morally wrong. Is the lawyer justified in departing from the role and violating the law? In general, an actor departing from the requirements of a role must make two judgments regarding both merit and appropriateness.¹⁰⁰ Merit refers to the first-order moral reasons that would bear on the actions of any moral agent. Consider circumstances similar to those in the *Spaulding* case,¹⁰¹ in which a person knows information that could save another's life if disclosed. That person should consider the importance of saving a life, as well as any interests that support confidentiality, such as a promise of secrecy made in order to acquire the information. When that person is specified to be a *lawyer*, however, judgments of appropriateness become necessary as well. These judgments pertain to whether it is acceptable for a particular agent to take an action, for example: "Actions of type A are (or are not) up to agent X."¹⁰² Maybe an ordinary moral agent can, or must, disclose the secret information, but it may not be appropriate for a lawyer to do so.

Central to the idea of a recourse role is that departures from the role must be justified on the grounds that there are "social needs that might otherwise go unanswered, where those needs are measured by the ends for which the role was initially instituted."¹⁰³ Recall Simon's argument from incoherence, summarized previously.¹⁰⁴ His point was that it is incoherent for lawyers to believe that their role and its associated demands are morally worthy because it contributes to justice, and then at the same time act in ways that subverts justice. We need not take for granted, however, that the ends of the legal system and the role of lawyer are justice. I have argued that the legal system, and therefore the lawyer's role, are aimed at maintaining a scheme of legal entitlements that allows citizens to structure their dealings with each other and with the state, with reference to norms that have been established collectively in the name of society as a whole. This is a much more positivistic conception of the role, with entitlements—established by positive law—and not justice, serving as the foundation. The argument about coordinating compliance with the demands of morality is necessary to

100. KADISH & KADISH, *supra* note 24, at 7.

101. *See supra* note 89 and accompanying text.

102. KADISH & KADISH, *supra* note 24, at 7 (emphasis added).

103. *Id.* at 32–33.

104. *See supra* notes 33–38 and accompanying text.

give some moral worth to entitlements,¹⁰⁵ but if it is accepted, then we have the outline of an approach to the lawyer's professional role that includes very different recourse conditions. Law can perform its function as a distinctive mode of governance precisely because of its independence from contested moral considerations. Thus, disagreement with the moral content of the law cannot be a basis for opting out of the requirements of the lawyer's role.

One might argue that, given the diversity of reasonable moral points of view, it is inevitable that any collective social decision will strike some citizens as at least wrongheaded, and possibly even unjust. If the basis for the authority of law is that it enables collective social action in the face of disagreement, the beliefs of citizens about the immorality of alternative courses of action are irrelevant to the obligation to obey. Dissensus is, after all, what got us into the circumstances of politics in which citizens have an interest in coordinated action notwithstanding their moral disagreements. Something that one citizen finds appalling may strike another as perfectly acceptable. Thus, in order to justify departing from a role—one of the most important ends of which is settling moral conflict—an action must be more than ordinarily unjust. I can only speculate about the beliefs of citizens on both sides of, say, the abortion debate, but I do not believe the perceived injustice involved in either legalized abortion or the restrictions on the availability of abortion justifies disobeying an abortion-related law. Committed pro-choice and pro-life activists may be dissatisfied with the current regime of abortion regulation, and both may regard it as morally wrong, but as a society we have to do *something* about abortion—either permit it or not, or make its availability subject to particular restrictions, or not—and there is no way to settle on the appropriate social response solely with reference to arguments concerning whether it is just. We have been having these moral arguments for decades about abortion, and they appear no closer to resolution. It does not help to compare some present injustice with some historical norms that we now universally acknowledge as an evil, like slavery. There are plenty of American citizens who believe that

105. As David Luban has noted, lawyers attempt to pull a moral rabbit out of the hat of the positive duties that define the lawyer's role. But the trick, of course, depends on getting the rabbit into the hat in the first place, and without some moral reason to respect the law, there would be no reason to respect the requirements of a role that are keyed to legal obligations. See David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 638.

abortion is an evil on a par with slavery. There is also probably an equal number of citizens who believe *banning* abortion would be a great moral evil, and some might compare the situation of women who lack full reproductive freedom with slavery. Perhaps there are other issues that provoke similar comparisons—school prayer, assisted suicide, the death penalty, or same-sex marriages. If a conception of roles permitted a lawyer to opt out when something approaching the substantive injustice of slavery were involved, then people on both sides of all of these debates would seek to appeal to this exception, and the result would be a return to the quagmire of disagreement that the law was supposed to avoid.

This strikes many legal theorists as much too strong, and they accordingly have sought to link the authority of law tightly with substantive justice. For example, on Larry Alexander and Emily Sherwin's account, the law has authority only insofar as it makes it more likely that citizens will comply with the requirements of morality:

[W]e are interested in more than coordination. The controversies Lex [the personified authority, "the law,"] addresses can be settled in better or worse ways, and one of the benefits the community seeks from his rules is avoidance of moral error through the application of Lex's superior expertise. Members of the community presumably have selected Lex because they have confidence in his moral expertise.¹⁰⁶

Heidi Hurd similarly contends that the law has authority only to the extent it directs citizens to the action that is morally required: "[T]he intentions of lawmakers are, on this view, a heuristic guide to determining the content of the law, which is itself a heuristic guide to determining the content of morality."¹⁰⁷ Contrary to the Brandeisian view that "[i]t is almost as important that the law should be settled permanently, as that it should be settled correctly,"¹⁰⁸ Alexander, Sherwin, and Hurd believe that the law functions as an authority in practical reasoning only to the extent it succeeds in guiding citizens toward the actions required by morality. This adds an element of natural law theory to what would otherwise be a positivist account, that is, Lex's laying down a law that settles a dispute.

The Alexander-Sherwin-Hurd position—that the law serves as a heuristic or a proxy for determining the content of morality—would underwrite at most a weak, defeasible claim of obligation within a role.

106. LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 98–99 (2001).

107. Heidi M. Hurd, *Interpreting Authorities*, in *LAW AND INTERPRETATION* 405, 425 (Andrei Marmor ed., 1995).

108. *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1866).

Lawyers should therefore be open to the possibility of rebalancing the underlying reasons to see whether the directives of law did, in fact, track the requirements of morality. This is the nexus view. As such, it relies on a tacit assumption that the nature of compliance with the demands of morality is the same in communities as it is for individuals acting in relative isolation. Any time one faces a demand for moral justification it means that the interests of others are involved because morality is fundamentally about justification to others in terms they cannot reasonably reject.¹⁰⁹ But it is important not to assume that the techniques of moral analysis that are appropriate to relatively small-scale interactions are necessarily appropriate to acting in communities characterized by reasonable ethical pluralism.¹¹⁰ With regard to the need for ethical justification in large-scale communities, it is not accurate to say that law has authority insofar as it enables individuals to comply with the demands of morality, as they would exist in the absence of a community. Rather, the law enables individuals to act on the common good, when the “common good” is understood as “a whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development.”¹¹¹ Individual reason alone will not lead to a conclusion regarding what morality requires in a community because compliance with morality in a community *means* coordinating one’s own beliefs about morality with the beliefs of others.

Thus, it will be a relatively unusual case that the ends of the lawyer’s role will be frustrated, justifying opting out of the role, not following the directives of the role, and having direct recourse back to the underlying ends of the role. In a case like *Spaulding*, many legal ethics theorists would permit recourse back to ordinary morality where the result—the lawyer’s refusal to disclose the injury—seems unjust. The claim here, by contrast, is that opting out of the role is permitted only when there has been a failure of the law to provide a basis for cooperating in the face of disagreement. The rules governing attorney confidentiality are

109. See SCANLON, *supra* note 55.

110. See FINNIS, *supra* note 63, at 136 (“[T]he complexity of human community . . . is often lost sight of by those who attempt to explain one order of reality using exclusively techniques of analysis suitable for another order . . .”).

111. *Id.* at 154.

among the most contentious aspects of the law of lawyering.¹¹² Every sector of the bar and the academy, as well as the public, has weighed in on the debate.¹¹³ The confidentiality rule and its exceptions represent a legitimate resolution of normative controversy and, as such, should be respected by lawyers and citizens. There is no fundamental failure of the lawyer's role, in terms of the purposes for which it is constituted, if the defendant refuses to disclose the full extent of the plaintiff's injury, as the lawyer is permitted to do.

IV. CONCLUSION

There is something distinctive about the law, legal reasoning, and the role of lawyers. That distinctiveness is captured by the idea that normative reasoning by citizens in communities is necessarily aimed at discovering what rights and obligations everyone ought to have, consistent with the interests of other citizens. It is implausible to believe that ordinary moral reasoning is well suited to working out a scheme of public entitlements that is suited to regulating the interactions among citizens who disagree about what their entitlements ought to be. The law has authority to the extent it enables people to do better than they otherwise could at the project of living and working together in a relatively peaceful, stable political community. In order to perform this function, however, the law must create exclusionary, second-order reasons for both citizens and lawyers. The lawyer's professional role may be described as a recourse role, but because the end of the law is coordination, it will be a very unusual case in which lawyers may disregard the obligations of the role and act directly on ordinary moral considerations.

112. As it happens, one of Fred's other major interests is attorney-client confidentiality. See, e.g., Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903 (1993); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69 (1999); Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367 (1995); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989). These articles cite the voluminous literature in legal ethics on confidentiality, arguing for stricter or looser disclosure rules.

113. For an example of a recent iteration of the debate over confidentiality, which included significant input from regulated industries and the public, consider section 307 of the Sarbanes-Oxley Act, 15 U.S.C. § 7245 (2006), which requires the SEC to promulgate rules governing attorney conduct in connection with representing an issuer of securities. The possibility that the SEC might mandate disclosure of client fraud caused apoplexy in much of the securities bar, and the provisions that were eventually adopted did not mandate disclosure. See, e.g., M. Peter Moser & Stanley Keller, *Sarbanes-Oxley 307: Trusted Counselors or Informers?*, 49 VILL. L. REV. 833 (2004) (citing criticism of the SEC's proposal). For a balanced assessment, see Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004).